



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

# YALE LAW JOURNAL

---

VOL. IV

FEBRUARY, 1895

No. 3

---

## CLASSIFICATION OF CORPORATIONS.

---

The growth and development of corporate agencies in connection with public affairs as well as in the commercial and manufacturing enterprises of the day, is one of the marked features of the present era. As a natural result thereof there has come about a change in the classification of corporations, and as our reasoning and judgment are largely influenced by the terms used in defining the subject matter, it is highly necessary that the terminology used in describing the different classes of corporations should be sufficiently accurate, or otherwise we may be misled in our conclusions. At the present time, courts and textwriters do not seem to be fully agreed upon the distinction existing between public and private corporations, and hence we constantly find the term, *quasi* public, used to describe a large class of corporations which do not seem to be properly defined as private.

In the Dartmouth College Case (4 Wheaton 517) one of the main questions at issue was the character of the corporation, created by the letters patent issued by the King of Great Britain, and known by the name of Dartmouth College. In the opinions delivered in that case by Chief Justice Marshall and Justice Story are to be found the divergent views which still tend to create confusion on the question of the difference between public and private corporations. Thus, in the opinion of Justice Story we find it said that, "Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for

public purposes where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the Government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the Government for its own uses, whose stock is exclusively owned by the Government, is in the strictest sense, a public corporation. So, an hospital created and endowed by the Government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is erected by the Government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person."

Thus it appears that Justice Story places the distinction between public and private corporations in the question whether the funds needed to sustain the corporation and accomplish its purposes are furnished from private or public sources. Instead of regarding the nature of the powers conferred upon the corporation, and the chief objects and purposes sought to be accomplished in its creation and maintenance, the learned Justice gave preëminence to the minor consideration of the immediate source from which the funds necessary for the operation of the corporation were derived. According to his view of the question, if a corporation is created by the State or National Government to build and operate a canal, turnpike, or railway, and the stock is owned by the Government, then the corporation is public, but if the stock is owned by individual citizens, then it is private. The matter of the ownership of the stock may be viewed in two aspects: 1. That it indicates the source whence the money used for the corporate purposes was derived. 2. That it indicates wherein the governing or controlling power of the corporation is lodged. Even if it were true that in all cases the money expended in furtherance of the corporate purposes was derived from the stockholders or by sales of the capital stock, it does not seem that this should be deemed to be the controlling element in determining the classification of the corporation. As an illustration, suppose the legislature of a State should create a corporation to undertake the building and operation of a highway for the use of the public, the money needed for the original building of the highway being raised by taxation in the ordinary method, and the

money needed for the maintenance and operation of the highway being provided for by tolls charged upon the persons and property transported over the same. In such a corporation there would be neither stock nor stockholders. Suppose at the same time the Legislature should create a corporation for the purpose of building and operating a similar highway for public use, and for the purpose of raising the money for the original construction of the highway, the corporation should be authorized to issue and sell capital stock, and for the purpose of meeting the expenses of operating the highway after its construction, and to pay a dividend upon the capital stock, the corporation should be empowered to charge and collect tolls upon the persons and property transported over the highway. According to the view of Justice Story one of these corporations would be public, and the other private, and yet wherein would there be any substantial difference between the two? In the one case the money needed for the original construction of the highway would be procured from the taxpayers at large, and any surplus left, after applying the tolls collected to the payment of expenses, would enure to the benefit of the taxpayers in that it would be paid into the public treasury. In the other case, the money used in the construction of the highway would be procured from those purchasing the stock, and the surplus would enure to their benefit. In this view of the matter, in the one case, the taxpayers would be the real stockholders, in the sense that they furnished the money used for corporate purposes, and in the other case the stockholders would be the more limited number who by purchasing the capital stock had furnished the funds for the original construction of the highway, but in both cases the money would be derived from the individual citizens. Furthermore, it is well known that, in these days, the money needed for large corporate enterprises is not usually derived from sales of capital stock, but rather from the sale of corporate mortgage bonds, the stock being manipulated for other purposes, so that it cannot be truthfully said that the ownership of the stock indicates the source whence the money used for corporate purposes was in fact derived. Neither does the ownership of the stock necessarily confer upon the stockholders the power to control or govern the corporation. Usually it is true that the stockholders do possess the power of electing the directors or managers of the corporation, but this is not essential to the existence of the corporation. The legislative grant of corporate rights, forming the charter of the corporation, may place the power of control in a named board of directors, and may provide for its continuance

irrespective of the wishes of the stockholders. In other words, it is not an essential element of corporate existence, that the control of its affairs shall be placed in the hands of the stockholders. If the distinction between public and private corporations is to be found in the ownership of the stock, then it would be true that the one corporation might upon one day be a public and the next day be a private corporation, in that the government owning the stock in the first instance might sell it to private parties. The mere ownership of the capital stock or the source from which the corporate funds are derived are not, therefore, the tests for determining the character of the corporate body. The true test is indicated in the opinion of Chief Justice Marshall, wherein, after stating that the funds for the support of the institution were furnished by private individuals, the learned Chief Justice continues: "Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? \* \* \* A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. \* \* \* But this being does not share in the civil government of the country, *unless that be the purpose for which it was created.* \* \* \* The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, *and the objects for which they are incorporated.*" In other words, if a civil institution is created in the form of a corporation for the purpose of partaking in any degree in the administration of civil government, or in the performance of duties which are governmental in their nature, and to that end the corporation is clothed with powers not possessed by the private citizen, then the corporation is public and not private. The true distinction between public and private corporations inheres in the objects and purposes they are created to subserve and in the character of the powers conferred upon them. Proper governmental powers, including the right of eminent domain, can be rightfully exercised only in furtherance of some public purpose. A corporation that can be lawfully clothed with the exercise of governmental powers must be created to subserve a public purpose, and being created to that end, and endued with governmental powers, it is of necessity a public corporation, regardless of the fact that the stock therein, if

any such there be, is owned by private individuals. A corporation, created for private purposes, does not exercise any governmental powers. The corporators, in their individual capacity, can exercise all the powers, strictly speaking, possessed by the corporation. Any private enterprise, lawful to be undertaken by a corporation, may be undertaken by the individual citizen. The act of incorporation confers certain *privileges* upon the corporate body, like that of continued succession or corporate immortality, not possessed by the individual corporators; but in the case of private corporations, it does not confer any governmental powers, that is, powers beyond those possessed by the individual citizen. Neither corporations nor individual citizens can undertake the performance of a governmental duty, nor exercise governmental powers, unless authority so to do is conferred by the government, acting through its appropriate channels, and when acting in pursuance of such authority, lawfully conferred, they are acting in a public capacity, and the corporation in such case, must be deemed to be a public corporation. Thus, we find that the true test is given by Chief Justice Marshall in his opinion in the Dartmouth College Case. What are the objects and purposes of the corporate body? Is it created in order to participate to any extent in the administration of civil government or in performance of governmental duties, or to subserve the public needs? Is it, by reason of the purposes it is created to advance, clothed with the right to exercise or to call into exercise any governmental power, like that of the eminent domain? If so, then it is a public corporation in the true sense of that term.

In the reported cases, as well as in the text books, the term "*quasi* public" is in common use as a description of a large class of corporations engaged in public enterprises, such as canal, turnpike, railway, gas, water and electric companies, and in the furtherance of which they exercise, under their charters, sovereign or governmental powers. According to the view entertained by Justice Story in the Dartmouth College Case, such use of this term is strictly proper, as applied to all such corporations wherein the ownership of the stock is private. The use of the term, however, clearly indicates that courts and text writers recognize that such corporations are in fact exercising sovereign powers for public purposes, and therefore must be dealt with as though they were public. In fact, according to the better view held by Chief Justice Marshall, corporations of this class are public and not private, and the use of the term "*quasi* public in connection therewith should be discontinued, for it is apt to mislead, in that it affirms

that such corporations are private, whereas, in fact they are not.

In the varied uses and purposes to which corporate powers and privileges are now applied, necessity exists for the adoption of some general terms of classification, which, when applied to a given corporation, shall describe with reasonable accuracy the character of the corporate body, having in view the objects and purposes of its creation, and the powers conferred upon it. To that end, it is suggested that corporations be classified as *Political*, *Public*, and *Private*. *Political*, to include that class of corporations created to exercise delegated sovereign control over a defined subdivision of the State, like Cities, Towns, Parishes, Counties, School Districts and the like. *Public*, to include that class created to aid in the performance of governmental public duties, or in supplying public needs, like companies organized to build and maintain the public highways, or to furnish water and light for common use, or otherwise to supply the public wants, and wherein, to enable the corporation to accomplish the object of its creation, there is conferred thereon the power to exercise the right of eminent domain or other sovereign power. And *Private*, to include that class of corporations created to advance private enterprises and undertakings, which are not authorized to exercise any sovereign power, but are in fact created only to confer privileges not available to the individual corporators.

*Oliver P. Shiras.*

DUBUQUE, IOWA.